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Supreme Court of the United States.

October Term, 1921.

No. 131.

NEW BEDFORD DRY DOCK COMPANY,

APPELLANT,

v.

BLAKE G. PURDY,

CLAIMANT OF THE STEAMER "JACK-O-LANTERN."

Brief for Appellant.

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BLAKE G. PURDY, CLAIMANT OF THE STEAMER "JACK-O-LANTERN."

BRIEF FOR APPELLANT.

Statement of Facts.

THE APPEAL.

This is a direct appeal under section 238, Judicial Code (Act March 3, 1911, 36 Stat. 1087, 1157, c. 231), from a decree of the District Court of Massachusetts dismissing a libel in admiralty for lack of jurisdiction.

FACTS.

Appellant, a Massachusetts corporation, filed its libel against the steamship "Jack-O-Lantern" to recover a balance claimed to be due for certain work done and materials furnished in the alteration and repair of said vessel.

The "Jack-O-Lantern" was originally a car-float of

the usual type, something over two hundred feet long, with neither motive power nor steering-gear, and having two lines of tracks on her single deck. The appellee bought her and proceeded to convert her into a steamer to be used for amusement purposes. The tracks were removed, the deck relaid to make a dancing-floor and a large house or superstructure was built enclosing most of the deck and containing a dance-hall, rooms, balconies, etc. Steering-apparatus and a steam-plant of the propeller type for propulsion were also installed.

For the purpose of carrying out these changes, the contract and specifications stated in pleadings were made between the appellee and appellant. It covers, generally speaking, all the woodwork involved in the changes above outlined. The appellant did not install the power-plant, but it did prepare the vessel for it. The vessel was towed to the appellant's yard for the work to be done. The engine and boilers were there installed. As they were not yet in working condition when the vessel left appellant's yard, she was towed away.

The hull remained substantially unchanged, and the vessel may be again readily converted into the original car-float by simply removing the pavilions constructed upon its deck and the power-plant. Attention is directed to the exhibit (photograph of vessel in appellant's yard).

DECISION OF THE DISTRICT COURT.

The District Court ruled that "the identity of the car-float was completely lost by the conversion into an amusement steamer under the contract in suit" and

that the case was governed by "the rules that a contract to construct a vessel does not give rise to such a maritime lien, and that the 'Jack-O-Lantern' with her dance-hall, rooms and power plant self-propelled and able to manoeuvre is an essentially different vessel from the car-float which furnished the hull," citing only—

McMaster v. *One Dredge*, 95 Fed. 832.
"*The Dredge A*," 217 Fed. 617, 629, 630.

Argument.

I.

THE VESSEL IS OF A CHARACTER SUBJECT TO ADMIRALTY JURISDICTION.

The character of the craft, whether considered as a car-float with a superstructure in which people can sit and dance or as a floating pleasure craft and dance-hall, is included within admiralty jurisdiction. It was a complete "vessel," a moveable, floating structure capable of navigation and designed for navigation.

In re Eastern Dredging Company, 138 Fed. 942 (mud-scow).
"*The Robert W. Parsons*," 191 U.S. 17 (canal-boat).
"*The Wilmington*," 48 Fed. 566 (canal-boat).
"*The New York*," 93 Fed. 495 (barge).
Ex parte Easton, 95 U.S. 68 (barge).
"*The Public Bath No. 13*," 61 Fed. 692 (floating bathhouse).
"*The Hezekiah Baldwin*," Fed. Cas. 6449 (floating elevator).

Lawrence v. *A Flat Boat*, 84 Fed. 200 (flatboat).

Southern Log Cart & Supply Co. v. *Lawrence*, 86 Fed. 907 (flatboat).

Malthy v. *Steam Derrick*, Fed. Cas. 9000 (movable derrick and pile-drivers).

II.

THE LEGAL QUESTION HERE INVOLVED.

It is now so firmly settled as to be no longer open to argument that contracts for the construction of new ships are non-maritime, and not within admiralty jurisdiction.

Thames Co. v. "*The Francis McDonald*," 254 U.S. 242.

There are numerous cases which, from time to time, have defined the line which is to be drawn between the claims which are for part of the construction of a ship and those which are to be considered, not as part of the original construction of the ship, but in the nature of repairs, alterations, or changes in an existing vessel. The case now at bar raises the question where the line is to be drawn, not at the beginning of a vessel's existence, but at the end of its career. The issue is not when the congeries of wood and iron begins existence (*Tucker* v. *Alexandroff*, 183 U.S. 424, 438) as a ship, but when the ship ceases to be such and is dissolved into its component parts. The case at bar presents the question where the line is to be drawn to determine when a vessel ceases to be a vessel so that any construction which uses its parts is not a continuance of the existing entity, but is the creation of a new entity.

Is the vessel a ship *in esse* remodelled, or a new craft created from the congeries of wood and iron—ordinary pieces of personal property which were taken out of the construction of another vessel and now reused as separable, individual items to build a new ship which had not before existed?

The appellant's contention here is that its work did not create a new maritime entity previously non-existent, but that the original car-float is still the present vessel, although it has a structure on its deck instead of car-rails.

III.

THE AUTHORITIES.

The issue presented in this case seems to have been raised before this court in *Rounds* v. *Cloverport Foundry*, 237 U.S. 303, where the defendant in error contended that the contract was non-maritime because "the old boat was dismantled, its identity destroyed, and a new boat built"; but this court did not then discuss or determine this question, as the case was disposed of on other grounds.

From time to time various of our admiralty courts have attempted to define that state of dismantling of a vessel when an existing vessel loses its identity so that the use made of its parts is a building of a new boat, and not the reconstruction of the existing vessel.

Presenting and analyzing these cases chronologically, they are as follows:

1849. "*The Ferax*," Fed. Cas. 4737:

A Massachusetts statute gave a lien in the case of the construction or repair of a vessel. A ship was brought

to the libellant for alteration. He put up berths, bulkheads, tables, etc., set up a number of deck-lights in the deck for staterooms, and otherwise fitted the boat to accommodate passengers for a California voyage. The District Court puts the query: "Suppose a vessel is changed from a brig into a bark, or internal alterations made to fit a merchantman for a whaleman; or suppose a vessel be coppered for the first time on a change of destination," and suggests that the work in the instant case was in the nature of alterations, and could not be treated as "repairs," which is restoration, and decides that alteration was "reconstruction," not orginal construction, and as such was plainly within the scope of the act, and held that the libellant had a lien.

1873. *Smith* v. "*The Royal George*," Fed. Cas. 13,102:

A ship carpenter was employed to build a new hull for a vessel. After the hull was completed, boilers and a pilot-house and its roof were taken from an old boat and put on the new hull. *Held* that there was no lien, inasmuch as the libellant had assisted in the building of a new boat "on which some of the materials from an old dismantled boat" were used, and that this did not make it an old boat, but it was a new boat.

1875. *Hardy* v. "*The Ruggles*," Fed. Cas. 6062:

Question whether "The Ruggles" was a new ship. (Hughes, D.J.): "Her hull was left intact. The frame of the engine, the boiler, the apparatus connected with the propelling wheel, and the wheel itself remained. There was no change of the model of the vessel except such as was necessary to giving her greater length.

All the old timber in the hull that was sound was retained in its former position. There was no breaking up of the vessel." The court then cites with approval an extract from Molloy: "If a ship be ript in parts, and repaired in parts, and taken asunder in parts, yet she remains the same vessel and not another; nay, though she hath been so often repaired that there remains not one stick of the original fabric"; and then holds that, although the steamboat was burnt to the water's edge, and in the rebuilding the length of the vessel was increased, yet as the old hull was used, it was a case of the old vessel rebuilt, and not a new vessel built.

1876. *United States* v. "*The Grace Meade*," Fed. Cas. 15,243:

A boiler exploded and sank "The Agnes," her sides were blown away, large openings blown into both sides of her hull. The boiler was ruined, the engine much damaged, the hull broken into halves, the deck blown off from the engine-room to the bow, most of the timbers of the vessel much shattered, all the ribs destroyed except three or four, the stern-post too much injured for reuse, and the wreck generally a bad one. The vessel was raised, the machinery was got out except the shaft, the engine-frame, and the wheel, which could not be removed. The vessel was left lying on the flats from October 1, 1872, to May, 1873. A vessel was then reconstructed in part out of new material and part out of the old, and the boat so built was called "The Grace Meade." The inquiry was whether in point of law "The Grace Meade" was a new vessel or the old

vessel "Agnes" rebuilt. It was held that "The Grace Meade" was a new vessel.

(Hughes, D.J.:) "And generally, it may be held as a principle, that, where the keel, stem, and stern-posts and ribs of an old vessel, without being broken up, and forming an intact frame, are built upon as a skeleton, the case is one of an old vessel rebuilt, and not of a new vessel. Indeed, without regard to the particular parts reused, if any considerable part of the hull and skeleton of an old vessel in its intact condition, without being broken up, is built upon, the law holds that in such a case it is the old vessel rebuilt, and not a new vessel."

1879. *Hartupee* v. "*The Coal Bluff No. 2*," Fed. Cas. 6172:

A lien depended on the identity of boats, and the question before the court was whether liens against the former boat "Coal Bluff" should be allowed to participate in the fund arising from the sale of "Coal Bluff No. 2." An entirely new hull was built. The old cabin and machinery were used. The court quotes with approval the opinion of the commissioner: "Where the absolutely essential portions of an old vessel, as the frame of the hull, are preserved intact, in reconstruction, the vessel is considered the same in law, but when not so preserved, and the absolutely essential portion new, as the hull, then the vessel is a new one, and may bear a new name. When first considering the question at what point transformation from the old to the new takes place, it is somewhat perplexing, and a satisfactory decision is not easily arrived at." The court refers to the cases of *Smith* v. "*The Royal George*" and *United States* v. "*The Grace Meade*" and the opinions

of various textbook writers, and comes to the conclusion that the second boat was a new vessel. "A new hull having been constructed and but comparatively little of the timbers of the old boat entering into the new, we are of the opinion that 'Coal Bluff No. 2' is a new boat."

1899. *McMaster* v. *One Dredge*, 95 Fed. 832:

A wood-scow or barge was altered into a dredge under a contract which called for payments of $640 and specified the details. Also certain machinery was repaired. It was held: "The purpose of this contract was to build this scow into a dredge. As a mere wood barge the things done were not required. It was only for the purpose of a dredge, which, in its relation with the scow, was a new thing, that the work and labor in this case were performed, and the materials furnished, and this is a building of the dredge . . . what was done and supplied in this case was for the purpose of making the vessel what it was intended to be, and what it had theretofore not been,—a dredge, a thing with which the wood scow, as such, had no relation." The opinion fails to cite any of the previous decisions, and treats the question as if it were a matter of novel impression.

1900. "*The Iris*," 100 Fed. 104, 108:

(Putnam, C.J.:) "It is claimed that the labor and supplies were for construction, and not for repairs. It is true that the expenditures were large, compared with the value of the vessel, and that she was, through them, readapted for a trade for which she had not been originally designed. Nevertheless, with reference to the

questions which arise in this case, they were not analogous to work done in the construction of a new vessel, nor even to the reconstruction of one which, through wreck or age, had become unsuitable to navigate the seas. At the time the labor and supplies were furnished, she was a sea going steamer; and, although her repairs were made under the supervision of a United States inspector of steam vessels, they were only such as were found necessary to adapt her for her new route. Therefore the labor and supplies are to be taken as furnished for repairs, and not for construction, as those expressions are understood in the various decisions of the federal courts."

1900. "*The Roanoke*," 101 Fed. 298:

A steamship which was adapted for service on the Great Lakes was turned over to libellant for extensive repairs and alterations, which adapted her for ocean service. There was considerable work on the hull and part of it was removed. The case went off on other grounds, but it is intimated that the changes were repairs, and not rebuilding of a new ship.

1908. "*The Emma B.*," 162 Fed. 966:

A schooner was used in the summer for excursion parties and in the winter for mackerel fishing. Her owners at the end of each season caused her to be altered for the purpose of the coming season. The libellant did certain work, changing her from an excursion boat to a fishing boat. The court found that the changes "probably did make her more fit for fishing than for excursion parties," yet ruled that these changes did not alter her character, and they were repairs, and not construction.

1910. *"The O. H. Vessels,"* 183 Fed. 561 (C.C.A. 3):

The ship had been engaged in carrying coal, hay, and other material of that character. Her sides were open to the weather. It was desired to put her into condition to carry perishable freight, and so it become necessary to enclose her deck. It was held that no alterations were made which would change the character of the barge. The work done in enclosing the vessel's deck could fairly be termed "repairs and not construction."

1914. *"The Dredge A,"* 217 Fed. 617:

A partially completed vessel at Philadelphia was brought to Beaufort, North Carolina, where it was completed and thereafter operated as a dredge. The questions presented were: (1) Whether the debts originating while the dredge was under construction were maritime liens. (2) Whether the debts originating while the dredge was in operation at Beaufort were maritime liens. There was a finding of fact that originally one Mitchell bought a certain old hull and carried the same to a shipyard at Philadelphia for the purpose of overhauling and reconstructing the same into a dredge. "The old hull so purchased by Mitchell had been built from timbers taken from an old government dry dock, and at the time contained a boiler, a condenser and heater and was not at this time a completed boat" (pp. 624, 630). The court held that "it would be to strain the meaning of words to call the thing, or object, thus described, a ship or vessel . . . The 'Dry Dock' timbers, from the timbers of which the hull was constructed, was not a ship. . . . He [Mitchell] gathered certain elements, which, when brought together, as-

sembled, co ordinated, resulted in, or brought into existence the entity, the thing, which he desired. The 'old hull' was the first element obtained, and upon this he placed certain machinery and appliances, which, being brought into orderly relation, constituted the dredge. The process, described by the master, is not 'reconstructing' or repairing an existing entity, but, by bringing together—correlating—a number of independent entities, constructing a definite entity; and this process is construction" (pp. 631-632). It was therefore held that there was no lien for work or material provided at Philadelphia.

The opinion, other than citing *McMaster* v. *One Dredge*, ignores the cases which we have called to the attention of this court, and the decision is rested wholly on the authority of the McMaster case.

Textbooks.

Malynes, "Consuetudo, vel Lex Mercatoria" (edition 1686), p. 123:

"Some make a question, whether a ship so amended and repaired shall be taken to be the same. But it is clear, that so long as the keel of the ship remaineth, it is still the same ship."

Justice, "Sea Laws" (edition 1705), p. 442:

"If a ship be broken up or taken in pieces, with an intent to convert the same to other uses; if afterwards upon advice or change of mind, she be rebuilt with the same materials, yet this is now another, and not the same ship, especially if the keel be ript up or changed, and the whole ship be once taken assunder and rebuilt, there determines the partnership as to the ship.

"But if a ship be ript up in parts, and taken assunder in parts and repaired in parts, yet she remains still the same vessel and not another; nay though she hath been so often repaired that there remains not one stick of the original fabrick."

1 Boulay-Paty, "Droit Commercial Maritime," p. 104:

"Il en serait autrement, si le vaisseau avait été démonté et rebâti, fut-ce des mêmes planches, sans que le fond du vaisseau subsistât toujours en son entier."

Emerigon on Insurance, c. 6, sec. 7 (Meredith's edition), p. 144:

"A ship is always presumed the same, though all the materials which at first had given it existence have been successively changed: Navim, si adeo saepe refecta esset, ut nulla tabula eadem permaneret, quae non nova fuisset, nihilominus eandem navim esse existimari. The Athenians preserved the galley of Salamis, during more than 1000 years, from the time of Theseus until the reign of Ptolemy Philadelphus. They were at great pains to replace the old with new planks: and hence arose a great dispute among the philosophers of the time; namely, whether this vessel, of which there did not remain a single original piece, was the same which conveyed Theseus, the conqueror of the Minotaur, in returning from the isle of Crete. The same question even now is stirred on the subject of the Bucentaur, a kind of sacred galley used on Ascension day in every year, by the nobles of Venice, when the doge performs the ceremony of espousing the sea. Though all the members of a body, or its parts, are changed through the lapse of time, nevertheless by

force of substitution the body is still presumed the same: Licet spatio temporis singula corpora mutentur, tamen, mediante subrogatione, semper dicitur eadem res. It is always the same people, the same senate, the same legion, the same edifice, the same flock, the same ship, etc.; Idem populus, eadem navis, idem aedificium, idem grex, idem vivarium, etc."

Parsons, "Shipping & Admiralty," pp. 80, 82:

"A ship would undoubtedly remain and continue to be the same ship, however extensively or frequently repaired; and even if at last all her original materials had disappeared. So, if she were taken to pieces with intent to reconstruct her and this was done. But it is said, that, if taken to pieces without this intent and afterwards reconstructed in part, she is a new ship."

Desty, "Shipping & Admiralty," p. 8:

On the strength of the cases of *Hardy* v. *"The Ruggles"* and *United States* v. *"The Grace Meade,"* Desty states as the law: "where the frame of the hull is not broken up in rebuilding, the vessel retains its name and identity . . . it is regarded as the same vessel in law."

Benedict, "Admiralty" (4th edition), p. 126, sec. 158.

"A ship is always the same ship although the original materials of which it was composed may, by successive repairs and alterations have been, in the course of time, entirely changed, and if a ship be entirely taken to pieces without the intention of reconstruction, and the same materials are reconstructed into a ship in

precisely the same manner, it would not be the same but another ship."

IV.

OUR CASE.

No elaborate discussion of the facts in this case can be necessary in the face of the photograph (Record, 12), and the admission stated in the opinion (Record, 10): "it is true that the hull is substantially unchanged."

The comparison of a "car-float" with a "steamer to be used for amusement purposes" seems to have misled the trial court into the error of concluding that, because a car-float is so different from such a steamer, we have a new vessel created *ab initio*.

The change of use or adaptability is not the test. Without becoming a new vessel, a merchantman may become a whaleman, a lake steamer an ocean craft, a coal-barge a freighter for perishable cargoes, an excursion schooner a mackerel fisherman. Adaptation for "a trade for which she was not originally designed" has repeatedly, and in instances explicitly, been rejected as the test of identity.

The only thing taken away from the car-float is the rails. A new deck is substituted for the old deck. From that stage all the rest are additions. So far this case is unique and different from all others in the books, because as it now stands it presents an instance of destroying the identity of a ship *in esse* by the quantity of the additions to a hull left intact.

Remove the light superstructure which has been built over part of the deck and relay the rails. You have not built a new car-float out of an amusement steamer. You

have not a third new entity, but you have back again the old car-float.

Begin step by step and test the district judge's reasoning. Place machinery in the old hull, and, while you have made the car-float self-propelling, you have not changed the identity of the craft. Then take up the rails to let couples dance on its deck. You do not then create a new vessel out of the car-float. Even relaying the deck to make dancing easier will not work a metamorphosis. If these changes have not created a new vessel, if a new entity was created, it must have been done by the erection of the superstructure. The authorities, however, make it clear that neither the size of the expenditure nor the extent of the additions is material if they are merely additions to the existing entity. Just as you can rip out all the insides of "The Ferax," add staterooms and all the paraphernalia to carry gold seekers over the seas to California, and still retain the identity of the original vessel, so, we submit, no matter how much paint and gingerbread frills have been added, through its disguise the court will see the original car-float.

If the test to be gathered from the authorities is the identity of the hull, whether we call this vessel a car-float or an amusement steamer, the entity is one and the same, as admittedly its hull has remained "substantially unchanged."

V.

RULE IN PEOPLES FERRY CO. v. BEERS.

The restrictive rule of *Peoples Ferry Co.* v. *Beers*, 20 How. 393, standing "opposed to the maritime law of practically all the world" (Hughes, Admiralty, 116),

subject to "possible and once not inappropriate criticism (254 U.S. 244), should not be extended beyond its present scope. Cases decided subsequently have not extended the rule beyond cases of original construction.

Roach v. *Chapman*, 22 How. 129.
Edwards v. *Elliott*, 21 Wall. 532.
"*The Winnebago*," 205 U.S. 354.
Thames Co. v. "*The Francis McDonald*," 254 U.S. 242.

The instant case falls without the scope of the reasons underlying the original-construction rule.

The basis for this rule is that "the structure does not become a ship, in the legal sense, until it is completed and launched."

Tucker v. *Alexandroff*, 183 U.S. 424, 438.
North Pacific S.S. Co. v. *Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119.

The rule is therefore inapplicable to a case where the structure at the time had been launched and was in use as a *completed* vessel.

VI.

CONCLUSION.

We respectfully submit that the decision of the District Court should be reversed, and the case remanded to that court for further proceedings.

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